IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

J U D G M E N T

Suresh Chandra Vs. State of Rajasthan

D.B.CRIMINAL APPEAL NO.131/1988
against the judgment dt.29.1.1988 passed by
the Sessions Judge, Udaipur,
in Sessions Case No.199/1985.

Date of Judgment: Oct.24, 2007

P R E S E N T

HON'BLE MR.JUSTICE BHAGWATI PRASAD
HON'BLE MR.JUSTICE DEO NARAYAN THANVI

Mr.Doongar Singh, for the appellant.
Mr.J.P.S.Choudhary, Public Prosecutor.

BY THE COURT: (PER THANVI J.)

1. This appeal is directed against the judgment & order of the learned Sessions Judge, Udaipur dated 29.1.1988, whereby he convicted the accused appellant Suresh Chandra for the offences under sections 302 and 394 IPC and sentenced him to undergo life imprisonment and to pay a fine of Rs.50/- & in default to further undergo one month's rigorous imprisonment under

Section 302 IPC and seven years' R.I. and to pay a fine of Rs.50/- and in default to further undergo one month's R.I. under Section 394 IPC. However, the learned Sessions Judge acquitted accused Poonam Chand and Babru for the offences u/ss.302 and 394 IPC.

2. Facts leading to this appeal are that on 23.2.1985, one Ramlal filed a written report (Ex.P.5) at Police Station, Vallabh Nagar that on the morning of the day at about 7 A.M., Mangilal came to him and told that when he was going at his well in connection with the opium farming, he saw one lady lying there with multiple injuries on her body and blood was coming out. Upon this, he alongwith Mangilal and Jagannath went at the field and saw that both the legs and hand fingers of the lady were cut by sharp edged weapon. The lady told her name to be Mohani wife of Dalu resident of Bhatewar and upon asking, she told that accused Suresh son of Prithvi Raj came to her house in the preceding evening and stated that her father is serious and he has been sent to bring her. Next day morning, her husband sent her with accused Suresh on bicycle, who stayed there in the night. On the way, two more persons came on the bicycle and near way to village Nawaniya, all the three accused persons inflicted injuries on her body and extorted ornaments in order to kill her. Upon this report, a case u/ss.307 and 394 IPC was

registered. The then Dy.S.P. Moti Singh reached on the spot and recorded the statement Ex.D.2 of injured Mohani and took her to the hospital, where after few days, she died due to multiple injuries. After usual investigation about recoveries, site plan, arrest etc., accused Suresh Chandra alongwith Poonam Chand and Babru were challaned in the court of Munsif & Judicial Magistrate, Vallabh Nagar, who committed the case to the Court of Sessions. Learned Sessions Judge framed charges u/ss.302 and 394 IPC to which all the three accused pleaded not guilty. The prosecution examined 24 witnesses. The statements of accused were recorded under section 313 CrPC. They led no evidence. After hearing the arguments, the learned Sessions Judge convicted the accused appellant Suresh Chandra as indicated above but acquitted rest of the accused.

3. We have heard learned counsel for the appellant as well as the learned Public Prosecutor.

4. Learned counsel for the appellant has argued that the finding of the learned trial Judge is totally based on dying declaration, which has got no evidentiary value in the eye of law, as it has been recorded by a police officer and not by magistrate and that too, much prior (say about 21 days) to the death of deceased, especially when it was not certified by the doctor that

she was in a fit state to give dying declaration. The alleged F.I.R. has also been filed after the dying declaration and is a concocted one. According to the learned counsel, when the recovery of ornaments has been disbelieved, there is no reason to convict the accused appellant under Section 394 IPC. As regards the offence under Section 302 IPC, it has been contended by the learned counsel for the appellant that the original intention as alleged by the prosecution was to steal the ornaments and not to commit murder of deceased Mohani. Therefore, the charge under Section 302 IPC cannot be sustained. It can, at the most, be either under Section 326 or Section 304 part II IPC.

5. On the contrary, learned Public Prosecutor has supported the judgment of the learned trial Judge.

6. Having re-appraised the evidence available on record and finding of guilt arrived at by the learned trial Judge, the sole ground on which the conviction of accused appellant has been based, is the dying declaration of deceased Mohani Ex.D.2 recorded by Dy.S.P. Moti Singh on 23.2.1985 at 9.20 A.M. in the presence of Mangilal and Jagannath and a note has been appended below the declaration that Mst.Mohani is seriously injured and is in the stage of death, which she admitted to be true and put her thumb impression. This statement has also

been corroborated by Mangilal and Jagannath, motbirs alongwith Ramlal, who has filed the F.I.R. (Ex.P.5). Now, the question for determination is whether on the basis of this sole dying declaration, the case for conviction of the accused u/s.302 IPC is made out or not? As revealed from the statement of Ramlal (P.W.5), who lodged F.I.R. (Ex.P.5), has stated that Mangilal came to him and told that a lady is lying in his field and several injuries have been inflicted on her body and blood was coming out. He reached on the spot and upon asking the lady, she told that accused Suresh s/o Prithviraj came to her house in the night and told that her father is ill at village Itali & he has been sent to bring her. On the night, he remained at her house. Next day morning, she went on bicycle with Suresh and on the way, two more persons came on the bicycle. They inflicted injuries on her. Two persons sat on her chest and accused Suresh cut her legs with knife and when she raised her hands, her fingers were also cut. This statement of Ramlal (PW 5) has been supported by Mangilal (PW 6) and Jagannath (PW 16). The same version of these two motbirs of dying declaration has been corroborated by the Dy.S.P. Moti Singh (PW 21) in which he has stated that upon getting information about the incident, he reached at the spot and recorded the statement of injured Mohani. Though the legality of dying declaration has been questioned by the learned counsel for the appellant on the ground that it has been recorded

by a police officer and there is no certificate to the effect that injured was in a fit condition to give her statement but in our view, this contention of the learned counsel is devoid of force in the light of provisions contained in Section 32 of the Indian Evidence Act, which reads as under:

> **32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant.-** Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-
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> **(1) when it relates to cause of death.-** When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
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> Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

7. Under the above Section, when any statement, written or verbal, is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, such statements are relevant whether the person who made them, was not under expectation of death. In the present case, when her legs were cut and later on, she was admitted in

the hospital and remained there for about 21 days prior to death. This fact that the accused appellant Suresh cut her legs and fingers of hand is a relevant fact, which relates to cause of death and has been supported by Dy.S.P. Moti Singh (PW 21), who recorded her statement and also Ramlal and other two motbirs Mangilal and Jagannath and there is no apparent contradiction in their evidence with regard to this relevant fact. It is not always necessary that the statement should be recorded by a magistrate only. Section 32 of the Evidence Act prescribes the relevancy of the statement with regard to a fact if it is proved by the person, who recorded it and the author cannot be called as a witness on account of death. The learned trial Judge has rightly observed that if, after close scrutiny, it is found that dying declaration was given by the deceased in a fit condition and was given voluntarily, the conviction can be based.

8. In the present case, apart from the close scrutiny of the dying declaration, which is also supported by the testimony of the three independent witnesses, who reached on the spot, as stated above the fact that the accused came previous night at the residence of deceased for taking to her parental house due to her father's illness and took her on bicycle next day morning, has been corroborated by the husband of deceased viz; Dalu (PW 8), who has stated that on the next day morning, he also

went at his in-law's house and on the way near the field of Brahmins, he saw many persons assembled there and his wife was lying injured thereupon he also became unconscious. In view of the above evidence, the fact that accused took the deceased from her house in the early morning and inflicted injuries for the purpose of robbery, is well established, even if there is no eye witness to the scene. Therefore, the conviction of accused recorded by the learned trial Judge so far as it relates to Section 394 IPC, it requires no interference.

9. As regards the offence under Section 302 IPC, it is abundantly clear from the evidence of the prosecution witnesses that there was no intention on the part of the accused appellant to kill deceased Mohani. As the facts revealed, his intention was to extort ornaments from her body and in doing so, he cut her legs and hand fingers. The cause of death as opined by Doctor Kothari (PW 20) was tetanus and septicemia vide Ex.P.25 and injury No.6 was dangerous to life. This injury is on the legs. Normally, an accused person cutting legs cannot have an intention to kill a person but that apart, multiple injuries were found on the body which were 21 in number and the accused is said to have inflicted injuries on the legs and fingers. The cause of death is the cumulative effect of all the injuries. It is not clear whether all the injuries were inflicted by the accused appellant

alone or by rest of the two assailants, who have been acquitted by the trial Judge. The motive as revealed from the evidence on record was to extort ornaments and not to cause death of deceased by inflicting injuries and this motive cannot be said to a motive for the intentional death or causing such bodily injury as is likely to cause death. Neither the injuries inflicted by the accused appellant were sufficient in the ordinary course of nature to cause death nor in all probability, they were so imminently dangerous, which may leave no excuse for incurring risk of causing death so as to bring the offence under the four corners of Section 300 IPC but it is a case of culpable homicide not amounting to murder punishable under Section 304 part II IPC because of knowledge of the accused that by inflicting such multiple injuries, there was a likelihood of causing death, which is well established. Accordingly, it would be expedient to convert the conviction of the accused appellant from Section 302 to 304 part II IPC.

10. So far as the sentence part is concerned, learned counsel for the appellant has submitted that the accused has already remained in jail for about five years. He was arrested on 6th August, 1985 and was released on bail on 6th Sept.1990 by the order of this Court. Keeping in view the sufficient tenure of jail, we deem it proper that ends of justice will be suffice, if he is

sentenced to the period already undergone.

11. Consequently, we allow this appeal in part, maintain the conviction of appellant Suresh Chandra for the offence u/s.394 IPC and alter the conviction from Section 302 to Section 304 part II IPC and while maintaining the fine, sentence him to the period already undergone.

(DEO NARAYAN THANVI), J. **(BHAGWATI PRASAD), J.**

RANKAWAT JK, PS